Supreme Court, U.S.
FILED

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NO. .....

IN THE
SUPREME COURT OF THE UNITED STATES

(OCTOBER TERM, 1999)

JOANNE STONE-FINCH, JOVITA FINE,
JOSEPH WENZEL,
Petitioners,

v.

CITY of PRESCOTT, a municipal entity, and,
HASSAYAMPA LAKE HOLDINGS, L.L.C.
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Q1: Has a municipal legislative body of the State of Arizona the constitutional authority to enact a law, and debar the power of the courts of the state from passing upon the question as to whether or not the law is subject to referendum by adding thereto the words, "This enactment is hereby declared necessary for the immediate preservation of the public peace, health, and safety, within the meaning of the constitution of Arizona?

Q2: Is the referendum the reserved power of the people, and are the attendant citizen actions of political speech, petitioning of the government and the act of voting upon the referendum, all federally protected constitutional rights, or is the referendum a mere legislative delegation of power which may be granted or revoked at the arbitrary whim of the legislature by the declaration of an emergency, unsupported by fact?

PARTIES TO THE PROCEEDING

Petitioners

JoAnne Stone-Finch, Jovita Fine and Joseph Wenzel.

Respondents

City of Prescott, a municipal entity, and, Hassayampa Lake Holdings, L.L.C.

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ARGUMENT 1
It is the opinion of this Court that legislation must be based upon facts, and it is the function of the courts to determine whether the factual basis for legislation exists and is constitutional.

ARGUMENT 2:
It is the opinion of many or most State Supreme Courts that the declaration of an emergency which would prevent the referendum of an enactment of legislation before the voters must be based upon facts and not a declaration of a nonfactual emergency by the Legislature.

ARGUMENT 3
The referendum is a reserved power of the people and not a legislative delegation of power and as such, it is fundamental to the laws of the United States so that the referendum and all attendant citizen actions such as political speech, the petitioning of the government and the process of voting upon the referendum are all constitutionally protected rights.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported West Group-Slip Opinion for April 2, 1999, pages 3047-3056., and is included in Appendix A. The Memorandum of Decision and Order of United States District Court, District of Arizona, July 30, 1997. is not published but is included in the Appendix B.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its Opinion on April 2, 1999. This petition for Writ of Certiorari is filed within 90 days of the issuance of the Opinion of the United States Court of Appeals for the Ninth Circuit. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

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Constitution of Arizona, Art.4 Pt.1 § 1

Legislative Authority; initiative and referendum,

(3) [Referendum power; emergency measures; effective date of acts]
The second of these reserved powers is the Referendum. Under this power the Legislature, or five per centum of the qualified electors may order the submission to the people at

the polls of any measure, or item, section, or part of

> the polls of any measure, or item, section, or part of any measure, enacted by the Legislature, except laws immediately necessary for the preservation of the public peace, health, or safety, or for the support and maintenance of the departments of the State Government and State institutions; but to allow opportunity for Referendum Petitions, no Act passed by the Legislature shall be operative for ninety days after the close of the session of the Legislature enacting such measure, except such as require earlier operation to preserve the public peace, health, or safety, or to provide appropriations for the support and maintenance of the Departments of State and of State institutions: Provided that no such emergency measure shall be considered passed by the Legislature unless it shall state in a separate section why it is necessary that it shall become immediately operative, * * *

Arizona Revised Statutes, § 19-141,

Referendum petitions against municipal actions: emergency measures similarly states:

"An emergency measure shall not become immediately operative unless it states in a separate section the reason why it is necessary that it should become immediately operative * * *."

STATEMENT OF THE CASE

On September 27, 1995, 7806 citizens of Prescott, Arizona, voted upon question 2 of the referendum issues, and 5339 or 68.4 percent voted to keep the Acker lands of approximately seventy acres intact and undeveloped. These lands lie close to the center of Prescott, Arizona, within approximately one mile of City Hall, and were highly valuable as residential developable property.

Council passed Ordinance #3423, invoking the non-factual emergency clause to enable the immediate sale of the Hassayampa Lake properties. The prior and successful referendum is the logical and factual trigger to the action of the City of Prescott, embodied in the Mayor and City Council, to engage in non-factual declaration of emergencies so as to prevent similar citizen referendum petitions regarding City of Prescott ordinances.

All of the litigation which has ensured in both State and Federal Courts is focused upon this type of action and presents an associated and unanswered question:

What is the state's compelling interest in being enabled to declare non-factual emergencies and thereby have legislation immediately effective and incidentally, subverting the right to a referendum?

Following rejection in the State of Arizona Courts of ***Glustrom, et al. v. City of Prescott, et al***, and also ***Hay v. Watson***, Plaintiffs filed this action in federal district court on October 8, 1996, based upon claimed issues of federal voting rights. The issue in ***Glustrom***, supra, was the failure of the City of Prescott to state in a separate section of the Ordinance #3423, the reasons for the emergency, thereby preventing a possible referendum on the sale of the Hassayampa Lake property.

The issues of law focused upon were the wording of the Arizona Constitution, related Arizona law granting the referendum and the history of Arizona case law regarding the validity or lack thereof when declaring non-factual emergencies in support of various executive and legislative actions. The issue is related to the concept of "separation of

powers", and claims that the courts could not review the factual basis of legislation.

Petitioners believe that the concept of "separation of powers" with regard to the non-factual declaration of emergencies in legislation is not now valid law and has not been since 1887, according to the Supreme Court decisions in ***Mugler v. Kansas***, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887) and subsequently in ***Chastleton Corp. v Sinclair***, 264 U.S. 543, 44 S.Ct. 405, 68 L.Ed. 841 (1924) and other cases.

The issue in ***Hay***, supra, was the refusal of the City Clerk to issue a referendum petition number. Both the Arizona Court of Appeals and the Arizona Supreme Court refused jurisdiction in the two Arizona cases.

Quoting from **Memorandum of Decision and Order**, pp. 8; (See Appendix B):

Plaintiffs filed this action in federal district court on October 8, 1996, challenging the passage with emergency clauses of Ordinances #3423 and #3460 as violative of the Plaintiffs' federal voting rights in violation of **42 U.S.C. §§ 1983** and **1985**. Plaintiffs allege that Defendants have at all relevant times acted under the color of law to impair the voting rights of the registered voters of the City of Prescott in violation of **42 U.S.C. § 1983.** In addition, the past and ongoing use of the emergency clause is a deliberate and continuing conspiratorial act done also in violation of **42 U.S.C. § 1985.** An Amended Complaint was filed on November 26, 1996.

As the federal district court case, CIV 96-2305-PCT-SMM continued, Plaintiffs, through the citing of appropriate case law included impairment of **First Amendment** rights of

political speech and the citizens' right to petition the government.

The Honorable Stephen M. McNamee, while recognizing that *res judicata* did not apply to Plaintiffs plea, did not recognize any federal rights or issues as applicable to the State granted privilege of Referendum and dismissed.

Plaintiffs cited nine errors in all in **Plaintiffs' Motion to Alter or Amend a Judgment** (See Appendix), of which six are believed to be fundamental error.

Plaintiffs filed Notice of Appeal timely in the United States District Court for the District of Arizona on October 17, 1997. The issues contained within that Notice and this Appeal are similar to those cited as error in **Plaintiffs' Motion to Alter or Amend a Judgment**.(See Appendix)

ARGUMENT FOR GRANTING THE WRIT

The decision by the Ninth Circuit of the United States Court of Appeals has overtones that extend beyond the issue of the referendum. This decision can allow legislative bodies within the Ninth Circuit to arbitrarily declare emergencies to enable legislation to become immediately effective and the justification to be beyond the reach of review by the courts.

This power extends to allow the referendum to be a legislatively controlled privilege, not governed by the state constitution, but by the arbitrary whim of the legislative bodies. The "reserved power of the people" becomes the "reserved power of the legislature".

ARGUMENT 1

It is the opinion of this Court that legislation must be based upon facts, and it is the function of the courts to determine whether the factual basis for legislation exists and is constitutional.

This Court, in a series of cases, beginning with ***Mugler v. Kansas***, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887); continuing with ***Block v. Hirsh***, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865; ***Chastleton Corp v Sinclair***, 264 U.S. 543, 44 S.Ct. 405, 68 L.Ed. 841 (1924); ***Home Building & Loan Association v. Blaisdell et ux.***, 290 U.S. 398, 54 S.Ct. 231 (1934); ***United States v. Carolene Products Co.***, 304 U.S. 144, 58 S.Ct. 778 (1938),and continuing with ***Baker v. Carr***, 369 U.S. 186, 82 S.Ct. 691 (1962), has emphasized that legislation must be based upon facts and not sumize or declaration of purported facts or prophesy.

In ***Mugler v. Kansas***, supra, this Court stated:

> The courts are not bound by mere forms, nor are they to be misled by mere pretenses. The are at liberty- indeed under a solemn duty- to look into the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended its * * authority. If, therefore, a statute purporting to have been adopted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of the rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution. 123 U.S. 623, 661, 8 S.Ct. 273, 297, 31 L.Ed. 205 (1877) (Underline for emphasis)

In ***Home Building & Loan Association v. Blaisdell et ux.***, supra, this Court emphasized the Court's ability to review state court and legislative declarations of factual situations of purported to be an emergency and stated:

> [12, 13] An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the state to protect the vital interests of the community. The declarations of the existence of this emergency by the Legislature and by the Supreme Court of Minnesota cannot be regarded as a subterfuge or as lacking in adequate basis. Block v. Hirsh, supra. The finding of the Legislature and state court has support in the facts of which we take judicial notice.

In ***Baker v. Carr***, supra, this Court cited ***Chastleton Corp v Sinclair***, supra, and stated:

"[A] Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared."

Question 1 poses the issue with regard to a municipal legislative body, such as the City Council of Prescott, Arizona. i.e. May that legislative body pass an ordinance declaring an "Emergency" which is factually unsupported in order to make legislation immediately effective?

At no time have Appellees or the Appeals Court addressed the vital issue of the state's compelling interest to have this power, to arbitrarily declare an emergency and enable legislation to be immediately effective. At no time did the Appeals Court or the Federal District Court address the fact situation leading to that declaration prior to the declaration of emergency or question the state's compelling interest to engage in such an action.

Petitioners do not, as the Court of Appeals states, seek an expansion of the referendum right itself, but enforcement of the Arizona Constitutional provision in that "no such emergency measure shall be considered passed by the

Legislature unless it shall state in a separate section why it is necessary that it shall become immediately operative."

Ariz. Const. Art. IV, Part 1, § 1(3). This has been Petitioners' position throughout the matter in state and federal courts.

The justification to deny the explanation of necessity of emergency declaration, and the denial of First Amendment rights, which the Court of Appeals acknowledges, is found in ***City of Phoenix v Landrum & Mills Realty Co.***, 71 Ariz. 383, 387, 227 P.2d 1911, 1013 (1951), and originated with ***Orme v. Salt River Valley Water User's Association***, 25 Ariz. 324, 217 P. 935 (1923), and which relied upon ***Oklahoma City v. Shields***, 22 Okl. 265, 100 Pac. 559 (1908), which held "the determination by the legislature that an emergency exists is an exercise of legislative discretion not reviewable by the judiciary.". This opinion is inconsistent with the previously cited decisions of this Court. It is worth noting that in ***Riley v. Carico***, 27 Okl. 33, 110 Pac. 738 (1910), the Oklahoma Court altered its position.

ARGUMENT 2:

It is the opinion of many or most State Supreme Courts that the declaration of an emergency which would prevent the referendum of an enactment of legislation before the voters must be based upon facts and not a declaration of a nonfactual emergency by the Legislature.

In a series of decisions given about seventy years ago, the State Supreme Courts of many states which had state constitutions which included the referendum, ruled that an arbitrary declaration of an emergency to inhibit the referring of legislation to the electorate was unconstitutional. The

importance of these decisions lies not only in the reasoning and longevity of these decisions, but also in the impact of an altering decision by this Court upon the perception of legislative authority.

While the Supreme Courts of Arizona and Oregon are not bound by those state court decisions, it is at least incumbent upon those courts and this Court to reflect upon the basis of those decisions in which ***Muglar v. Kansas,*** supra, figures directly or indirectly. The two most important of these decisions are:

State ex rel. Goodman v. Stewart, 187 P. 641 (1920), and ***State ex rel. Pollock v. Becker,*** 233 S.W. 641 (1921).

These two decisions are tutorial in nature and discuss in fairly thorough terms, the issue of the declaration of emergency as affecting the referendum and those states which have taken a similar position or altered their prior position to conclude that the declaration of a non-factual emergency to inhibit the referral of legislation to the voters is unconstitutional.

Of especial importance with regard to the decision in ***Orme v. Salt River Valley Water User's Association***, supra, was that these decisions were available to the Arizona Supreme Court in 1923 and that the referred to logic in ***Oklahoma City v. Shields***, supra, had been overturned or modified some thirteen years previously and did not reflect the opinion of many or most courts of states having constitutional referendum provisions at that time.

State ex rel. Goodman v. Stewart, supra, discusses whether "the declaration by the Legislature of an emergency is conclusive upon the courts." 187 Pac. 642. At the time, a

prevailing decision was in ***Kadderly v. Portland***, 44 Or. 118, 74 Pac. 720, and also cited in ***Oklahoma City v. Shields***, supra, 100 Pac. 574. The court quoting ***Kadderly v. Portland***, supra, stated:

> The court held that-
> " 'when the Legislature enacts a law, the only question which we can decide is whether the limitations of the Constitution have been infringed upon.' The amendment excepts certain laws as may be necessary for certain purposes. The existence of such necessity is therefore a question of fact, and the authority to determine such fact must rest somewhere. The Constitution does not confer it upon any tribunal. It must therefore necessarily reside with that department which is called upon to exercise the power. It is a question of which the legislature alone must be the judge, and when it decides to exist its action is final." (cites omitted)
>
> The Supreme Court of Montana demurs with:
>
> We believe the learned justice who wrote the opinion based his conclusion on a false premise; he argues that because the question is a question of fact, and the authority to determine that fact rests "somewhere," and the constitution has not conferred it upon any tribunal, it must necessarily rest with the Legislature. If the reasoning was sound, it would apply with equal force to questions arising as to whether acts were in violation of the state Constitution, and on passage of local and special laws on the prohibition subjects; for here also "the authority to determine it must rest somewhere," and "the Constitution does not confer it upon any tribunal." Id. At 643

The Supreme Court of Montana goes on to identify various states which preclude arbitrary declarations of emergency associated with the referendum:

South Dakota, ***State v. Whisman***, 36 S.D. 260, 154 N.W. 707;
Oklahoma, ***Riley v. Carico***, 27 Okl. 33, 110 Pac. 738;
North Dakota, ***State ex rel Langer v. Olson***, 176 N.W. 528;
Washington, ***State ex rel. Brislawn v. Meath***, 84 Wash. 302, 147 Pac. 11; Ohio, ***Miami County v City of Dayton***, 92 Ohio St. 215, 110 N.E. 726; California, ***McClure v. Nye***, 22 Cal. App. 248, 133 Pac. 1145, and in ***Rigdon v. Common Council***, 30 Cal. App. 107, 157 Pac. 513; Nebraska, ***State v. Pacific Exp. Co.***, 80 Neb. 823, 115 N.W. 619.

The Supreme Court of Montana then goes on to cite the previously given quote from ***Mugler v. Kansas***, supra, and holds:

> "[3-5] We hold, therefore, to the rule laid down in the case of ***State ex rel. Brislawn v. Meath***, cited that- 'When, therefore, the question comes whether the Legislature has a right to declare an emergency which would take away the right of referendum, the doubt, if there be any, should be resolved in favor of the reserved power of the people, instead of in the admittedly unwarranted declaration by the Legislature.' * * * * The declaration that the act is necessary for the immediate preservation of the public peace and safety has no more binding force than would the declaration in an act that "this act is constitutional," or "this is a general and not a local or special act." * * * * Under the federal Constitution, the duty of determining and declaring the constitutionality of an act by the courts is

> imperative. U. S. Const. Art 6. Whenever, herefore, a legal controversy arises over the constitutionality of an act, or as to whether a given act is within or without the authority of the Legislature, the determination of that fact is essentially a judicial question to be determined by the courts. Id. At 648.

In ***State ex rel. Pollock v. Becker,*** supra, the Supreme Court of Missouri in Graves, J. concurrence, stated:

> It is absolutely against all reason to rule that the Legislature can, by trick and chicanery, through a declaration against the very face of the bill, cut the people off from the constitutional rights to refer all measures and yet retain the legislative right. In what we ruled in Sullivan's Case we had in mind all rules of statutory construction, as well as all exceptions to such rules. We have recognized the exceptions before
>
> (109 Mo. Supra), but exercise the same privilege in that case. As said there, to hold that the Legislature could, by the use of a declaration that the given bill was "necessary for the immediate peace, health or safety" of the state, when in fact the bill itself showed no emergency, would be to destroy the constitutional provision. Neither court nor Legislature should so construe a Constitution as to make it self destructive. But after all the section of the bill making this declaration of great emergency must be construed with all the other provisions of the bill, and if, when so construed by a court, it fails to measure up to the spirit of the Constitution, it must fail, we said enough in Sullivan's case, and will not further reiterate. 233 S.W. 641, 646.

ARGUMENT 3

The referendum is a reserved power of the people and not a legislative delegation of power and as such, it is fundamental to the laws of the United States so that the referendum and all attendant citizen actions such as political speech, the petitioning of the government and the process of voting upon the referendum are all constitutionally protected rights.

In *Eastlake v. Forest City Enterprises, Inc.*, supra, the Supreme Court of the United States stated:

> Relying on this Court's decisions in * * *(cites omitted), the court concluded that the referendum provision constituted an unlawful delegation of legislative power. We reverse.
>
> [2, 3] The conclusion that Eastlake's procedure violates federal constitutional guarantees rests upon the proposition that a zoning referendum involves a delegation of legislative power. A referendum cannot, however, be characterized as a delegation of power. Under our *constitutional assumptions*, all power derives from the people, who can delegate it to representative instruments which they create. See, *e.g.*, The Federalist No. 39 (v. Madison). In establishing legislative bodies, *the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature*. *Hunter v. Erickson*, 393 U.S. 385, 392, 89 S.Ct. 557, 561, 21 L.Ed.2d 616 (1969).

> The reservation of such power is the basis for the town meeting, a tradition which continues to this day in some states as both a practical and symbolic part of our democratic processes. The referendum, similarly, is a means for direct political participation,
>
> allowing the people the final decision, amounting to a veto power, over enactments of representative bodies. The practice is designed to "give citizens a voice on questions of public policy. *James v. Valtierra, supra,* 402 U.S., at 141, 91 S.Ct. at 1333. 426 U.S. 668, 672-3, 96 S.Ct. 2358, 2361-2. *(Bold, italics and underline for emphasis)*

The Tenth Amendment to the United States Constitution states:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, *are reserved to the States respectively, or the people."* (Italic emphasis)

In interpreting *Eastlake*, supra, the Supreme Court of the United States treats the "reserved power of the people" to include both the referendum and the town meeting similarly. The Supreme Court makes this statement using the words,

"Under our *constitutional assumptions*, all power derives from the people".

Plaintiffs conclude that the referendum and town meeting are federal constitutional rights included in the Tenth Amendment of the Federal Constitution since the Supreme Court of the United States has also stated:

"the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature."

CONCLUSION

The major issue throughout in the litigation has been Question 1 presented herein. The Court of Appeals has mistakenly interpreted this focus to be an attempt to expand the scope of the referendum right. This is an unfortunate conclusion since the facts of the case and the case law cited focussed upon the two-fold position of this Court that legislation is based upon facts and the Courts have the power and duty to make that review.

The second error of the Court of Appeals is the failure to recognize that the referendum is fundamental, a reserved power of the people, not granted as a State legislative privilege, but also fundamental as "the general form and aspect of the government be strictly republican." The Federalist Paper, Madison No.39, lines 5-7, page 1.

These are terms which did not originate from Petitioners, but from this Court in defining the referendum in ***Eastlake v. Forest City Enterprises, Inc.***, 426 U.S. 668, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976),

This Petition for a Writ of Certiorari should be granted. The alternative is to permit an erosion of the two principles cited, that legislation is based upon facts and the Courts have the power and duty to make that review.

APPENDIX:

Appendix A
Ninth Circuit Opinion of April 2, 1999.
Unpublished, listed as 10 pages,
Numbered as pages 3047 to 3056

Appendix B
Memorandum of Decision and Order of United States District Court, District of Arizona, July 30, 1997,
Listed as 23 pages, Numbered as pages B-2 to B-23.

Appendix C
Plaintiff's Motion to Alter or Amend a Judgment,
August 12, 1997. Listed as 9 pages,
Numbered as pages C1- to C-9.

Appendix D
Order of United States District Court, District of Arizona, September 19, 1997. Listed as 4 pages,
Numbered as pages D-2 to D-4

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOANNE STONE; JAMES CRAIG, JOVITA FINE, JOSEPH WENZEL,

Plaintiffs-Appellants,

and

CHARLENE CRAIG,

Plaintiff,

v.

CITY OF PRESCOTT, a municipality entity; HASSAYAMPA LAKE HOLDINGS, L.L.C.,

Defendants-Appellees,

and

MALCOLM BARRETT; LINDSAY BELL; PAUL DALY; LOUIS FRANYI; NANCY HOLADAY; PHILIP KING; MARY ANN SUTTLES; KAREN THOMPSON; DAITON RUTKOWSKI; HAROLD WISE; JOHN MOFFITT,

Defendants.

No. 97-17121

D.C. No. CV-96-02305-SMM

OPINION

Appeal from the United States District Court
for the District of Arizona
Stephen M. McNamee, District Judge

Argued and Submitted
February 11, 1999—San Francisco, California

Filed April 2, 1999

Before: Harlington Wood, Jr.,[1] David R. Thompson, and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Thomas

SUMMARY

Government Law/Elections

The court of appeals affirmed a judgment of the district court. The court held that an emergency declaration in a city ordinance can defeat the referendum right of Arizona voters.

The city council of appellant City of Prescott, Arizona passed an ordinance that provided for the sale of Hassayampa Lake to appellee Hassayampa Lake Holdings, L.L.P. The ordinance included a declaration of emergency making it effective on its approval by the mayor and city council. A few months later, the council passed another ordinance that also had a declaration of emergency; it authorized the acceptance of a grant of mining rights from potential claimants on the title to the Hassayampa property.

Appellant Joanne Stone and others opposed the land transactions and organized a referendum to undo the city council's work in effecting them. The Arizona Constitution provides that an emergency measure cannot be considered by the legislature unless it states why it is necessary that it become immediately operative.

The City Clerk refused to issue a referendum petition on the ground that it was passed under an emergency declaration and therefore not subject to referendum under the Arizona Constitution.

[1]The Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit Court of Appeals, sitting by designation.

In state court, Stone and other citizens/registered voters sued the City and Hassayampa Lake Holdings, alleging violation of their referendum rights under the Arizona Constitution. The trial court ruled that passage of an ordinance with an emergency clause was not subject to judicial review even if there was no emergency. The Arizona appellate courts upheld the trial court's ruling.

Citing the First and Tenth Amendments, Stone and the other plaintiffs sued in federal court under 42 U.S.C. § 1983, alleging that the defendants violated their constitutional right to a referendum. The district court granted summary judgment for the defendants. Stone and the other citizens/voters appealed.

[1] It is the power of the federal government that is constrained by the Tenth Amendment, not the power of the states. The plaintiffs could not found a § 1983 claim on the Tenth Amendment because it is neither a source of federal authority nor a fount of individual constitutional rights. [2] There is no authority for the proposition that the appellants had a right to a city referendum under the Tenth Amendment.

[3] States may not place overly restrictive conditions on citizens attempting to exercise initiative or referendum rights. [4] Where the people reserve the initiative or referendum power, exercise of that power is protected by the First Amendment. Thus, a state may not impermissibly burden the exercise of the right to petition the government by initiative or referendum, even if the burden is imposed by the state constitution.

[5] However, in this case, the plaintiffs did not challenge a restriction on their exercise of the referendum right, or on the speech they chose to advocate its passage. Instead, they sought to expand the scope of the referendum right. The people of Arizona provided in the state constitution that the referendum power is not applicable to laws passed under

declaration of emergency. [6] This is not a restriction, condition, or requirement that impermissibly burdens the exercise of the referendum power, thereby invoking the protection of the First Amendment. It is a delegation to the legislature by the people of part of their reserved power of referendum. The emergency declaration by itself did not implicate First Amendment concerns.

[7] The plaintiffs identified no constitutionally protected liberty interest created by operation of law. Arizona law provides for municipal ordinances passed by emergency declaration to be given immediate effect. Arizona courts have ruled that the determination by the legislature that an emergency exists is an exercise of discretion not reviewable by the judiciary. Arizona has not created a referendum right to challenge an ordinance passed by emergency declaration.

COUNSEL

William B. Fortner, Prescott, Arizona, for the plaintiffs-appellants.

Ralph M. Hess, Prescott, Arizona, for the defendants-appellees.

OPINION

THOMAS, Circuit Judge:

Plaintiffs claim that the City of Prescott and its elected officials violated their civil rights by depriving them of the opportunity to petition for a city-wide referendum challenging certain real property transfers. The district court granted summary judgment in favor of the City. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

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I

In October 1995, the city council of Prescott, Arizona ("City") passed Ordinance # 3423 which provided for the sale of City-owned Hassayampa Lake to Hassayampa Lake Holdings, L.L.C. The ordinance included a declaration of emergency stating that:

> [T]he immediate operation of the provisions of this Ordinance is necessary for the immediate preservation of the public peace, health or safety, and that an EMERGENCY is hereby declared to exist; and THIS ORDINANCE SHALL BE IN FULL FORCE AND EFFECT FROM AND AFTER ITS PASSAGE, ADOPTION AND APPROVAL BY MAYOR AND COUNCIL OF THE CITY OF PRESCOTT.

In December 1995, the City passed Ordinance # 3460, which included a similar declaration of emergency, authorizing the acceptance of a grant of mining rights from individuals with potential claims on title to the Hassayampa Lake property. The plaintiffs opposed the land transactions and sought to undo the work of the city council by organizing a referendum of voters to rescind the transactions.

Under the Arizona Constitution the people reserved the power of the referendum. *See* Ariz. Const. art. IV, Part 1, § 1. The Arizona Constitution provides an exception to the referendum power for "laws immediately necessary for the preservation of the public peace, health, or safety, or for the support and maintenance of the departments of the State Government and State institutions . . . ." *Id.* § 1(3). It further provides that "no such emergency measure shall be considered passed by the Legislature unless it shall state in a separate section why it is necessary that it shall become immediately operative . . . ." *Id.* The Arizona Constitution also reserves the power of the referendum "to the qualified electors of every incorpo-

rated city, town, and county as to all . . . matters on which . . . [they] . . . shall be empowered by general laws to legislate." *Id.* § 1(8).

Relying on this provision, registered voter Robert Hay requested the City Clerk of Prescott to issue a referendum petition so Ordinance # 3640 could be referred to city voters. The City Clerk refused to issue a petition because the Ordinance was passed under emergency declaration and therefore not subject to referendum under the Arizona Constitution.

Plaintiff citizens and registered voters of Prescott reacted by filing suit in Yavapai County Superior Court, contending that the City had violated their rights to a referendum under the Arizona Constitution. The state court ruled that the passage of the ordinance with the emergency clause was a nonreviewable exercise of legislative discretion even if there was no actual emergency. Both the Arizona Court of Appeals and the Arizona Supreme Court declined further review. Plaintiffs then filed this action in federal court pursuant to 42 U.S.C. §§ 1983 and 1985, alleging that the City, its officials, and the developer who purchased Hassayampa Lake had violated, and conspired to violate, their constitutional right to a referendum. They sought injunctive and declaratory relief to restrain the defendants "from using a nonfactual declaration of emergency" and rescind the Hassayampa Lake property transactions. The district court granted summary judgment in favor of the city, and this appeal followed.

II

We review a grant of summary judgment de novo, *see Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998), and hold that the district court correctly granted summary judgment on plaintiffs' claims under 42 U.S.C. § 1983 and § 1985.[2]

[2]Plaintiffs mention but do not press their § 1985 claim on this appeal. However, our affirmance of summary judgment on plaintiffs' § 1983 claim also disposes of their § 1985 claim. *See Giannini v. Real*, 911 F.2d 354, 359 (9th Cir. 1990) (stating that "deprivation of federal constitutional rights is a necessary element" of an alleged conspiracy under § 1985).

To state a claim against the City officials under section 1983, plaintiffs must allege that the officials acted under color of state law to deprive them of a right secured by the federal Constitution or by federal law. *See Gomez v. Toledo*, 446 U.S. 635, 640 (1980). Here, plaintiffs failed to establish that they have been deprived of any federal right. Thus, summary judgment was appropriate.

A

Plaintiffs first argue that their right to a referendum is established by the Tenth Amendment, which provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." U.S. Const., amend X. However, plaintiffs misapprehend the scope and purpose of the Tenth Amendment.

The Tenth Amendment confirms "that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York v. United States*, 505 U.S. 144, 157 (1992). It encompasses "any implied constitutional limitation on Congress' authority to regulate state activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution." *South Carolina v. Baker*, 485 U.S. 505, 511 n.4 (1988). The Tenth Amendment stands as a limitation on federal power because it "prohibits the exercise of powers 'not delegated to the United States.' " *Printz v. United States*, 117 S. Ct. 2365, 2379 (1997).

[1] Thus, it is the power of the federal government which is constrained by the Tenth Amendment, not the power of the States. Plaintiffs cannot found a section 1983 claim on the Tenth Amendment because it is neither a source of federal authority nor a fount of individual constitutional rights.

[2] Plaintiffs insist that the Supreme Court recognized a right to a referendum under the Tenth Amendment in *City of*

Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976). They are mistaken. In *Eastlake*, the Court concluded that zoning by referendum is not per se an arbitrary delegation of legislative power, because the referendum power is one reserved to the people. *Id.* at 672. The Court recognized that "[a]s a basic instrument of democratic government, the referendum process does not, in itself, violate the Due Process Clause . . . when applied to a rezoning ordinance." *Id.* at 679. The Court did not suggest that the referendum process is a fundamental right guaranteed by the Tenth Amendment. Indeed, there is simply no authority for the proposition that appellants have a right to a city referendum arising under the Tenth Amendment. Therefore, plaintiffs' argument that the Tenth Amendment affords them a federal referendum right is without merit.

B

[3] Plaintiffs also argue that preclusion of the referendum process by emergency ordinance burdens their First Amendment right to petition the government. True, states may not place overly restrictive conditions on citizens attempting to exercise initiative or referendum rights. *See Buckley v. American Const. Law Found., Inc.*, 119 S. Ct. 636, 649 (1999) (holding that Colorado regulations requiring petition circulators to be registered voters and to wear name badges are "restrictions that unjustifiably inhibit the circulation of ballot-initiative petitions"); *Meyer v. Grant*, 486 U.S. 414 (1988) (holding that a Colorado law making it a felony to pay petition circulators in the referendum process imposed an undue burden on political expression).

[4] However, plaintiffs' claims do not fall within the orbit of *Meyer* and *Buckley*. Those cases teach that where the people reserve the initiative or referendum power, the exercise of that power is protected by the First Amendment applied to the States through the Fourteenth Amendment. *See, e.g., Meyer*, 486 U.S. at 420. Thus, a State may not impermissibly burden the exercise of the right to petition the government by initia-

tive or referendum. That holds true even if the burden is imposed by the State Constitution itself. *See Buckley*, 119 S. Ct at 641-42 (requirement that petition circulators be registered voters does not escape scrutiny because it had been adopted as a constitutional amendment).

[5] In this case, however, plaintiffs do not challenge a restriction on their exercise of the referendum right, nor on the speech they may chose to employ to advocate its passage. Instead, plaintiffs seek to expand the scope of the referedum right itself. The people of Arizona did not delegate the referendum power to the legislature — they reserved that power to themselves. However, they did not elect to reserve it absolutely. Ariz. Const. art. IV, Part 1, § 1. Instead, they provided in the State Constitution that the referendum power is not applicable to laws passed under declaration of emergency. *Id.* § 1(3).

[6] This is not a restriction, condition, or requirement that impermissibly burdens the exercise of the referendum power, thereby invoking the protection of the First Amendment. Instead, it is a delegation to the legislature by the people of a part of their reserved power of referendum. Thus, the emergency declaration by itself does not implicate First Amendment concerns.

C

[7] Finally, plaintiffs identify no constitutionally protected liberty interest created by operation of state law. Arizona law specifically provides for municipal ordinances passed by emergency declaration to be given immediate effect. *See* Ariz. Rev. Stat. § 19-142 (1991). Furthermore, the Arizona courts have ruled that "the determination by the legislature that an emergency exists is an exercise of legislative discretion not reviewable by the judiciary." *City of Phoenix v. Landrum & Mills Realty Co.*, 227 P.2d 1011, 1013 (Ariz. 1951). Thus,

Arizona has not created a referendum right to challenge an ordinance passed by emergency declaration.

In sum, plaintiffs have identified no federal or state right that the City violated in passing the ordinances with an emergency declaration. Thus, they cannot state a claim under section 1983. *Duffy v. Riveland*, 98 F.3d 447, 456 (9th Cir. 1996). As a consequence, we affirm the district court's grant of summary judgment in the City's favor.

III

At the core of their argument, plaintiffs propose that the federal courts serve as a factual arbiter of whether a true "emergency" exists as contemplated by the Arizona Constitution. Indeed, at oral argument, they suggested that this was an issue appropriately decided in each instance by a federal jury who would ascertain whether the requisite emergency actually existed and instruct municipalities accordingly. Such a role for federal courts strains the idea of cooperative federalism, to say nothing of its impact on state sovereignty. Certainly, the behavior of the City in attempting to thwart the spirit, if not the letter, of the Arizona Constitution is deplorable if true. However, plaintiffs' remedy lies in the Arizona state courts, or perhaps at the ballot box, not with a federal jury.

AFFIRMED

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APPENDIX B- 23 PAGES

JUL 30 1997(stamp of)
CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

JOANNE STONE, CHARLENE CRAIG, JAMES CRAIG, JOVITA FINE, and JOSEPH WENZEL, Plaintiffs v. CITY OF PRESCOTT, a municipal entity; MALCOLM BARRETT; LINSAY BELL; PAUL DALY; LOUIS FRANYI; NANCY HOLADAY; PHILIP KING; MARY ANN SUTTLES; KAREN THOMPSON; DAITON RUTKOWSKI; HAROLD WISE; JOHN MOFFITT; HASSAYAMPA LAKE HOLDINGS, L.L.C., Defendents	] CIV 96-2305-PCT-SMM] **MEMORANDUM OF DECISION AND ORDER**

Plaintiffs, registered voters and citizens of the City of Prescott, AZ, filed an amended class action complaint on November 26, 1996.(1) Plaintiffs allege that Defendants, the City of Prescott, the Prescott City Council, the City attorney, and a land purchaser abridged and conspired to abridge, Plaintiffs' voting rights in connection with the sale of Lake Hassayampa in

Ft.1 Plaintiffs original complaint was filed on October 8, 1996 Plaintiffs, amended complaint adds JosephWenzel as Plaintiff.

Prescott, AZ. Plaintiffs seek injunctive and declaratory relief under 42 U.S.C. §§ 1983 and 1985, and attorneys' fees and costs. Defendant City of Prescott and Defendant Hassayampa Lake Holdings, L.L.C. each filed a motion to dismiss. The motions fully briefed and argued on July 14, 1997, are considered herein.(2)

I. STANDARD OF REVIEW

In deciding a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a court must presume all factual allegations of the complaint to be true. Miree v. DeKalb County, Georgia, 433 U.S. 25, 27 n.2 (1977); NL Indus. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). Although the complaint is construed in the light most favorable to the plaintiff, legal conclusions couched as factual allegations, however, are not given a presumption of truthfulness. Western Mininer Council v. Watt, 643 F.2d 618, 624 (9th Cir.), cert.

Ft.2-Also pending before this Court is Plaintiffs, Motion for Certification of Class Action Pursuant to Rule 23 (c) (1) & 23(c)(3), and Approval of Eligible Voter Standard Procedure to opt-out filed on February 21, 1997.

However, Federal Rule of Civil Procedure 12(b) provides:

> If, on a motion asserting the defense numbered (6) to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Fed. R. Ci"v. P. 12(b) (emphasis added).

Defendants attached several exhibits to their motions to dismiss. The exhibits constitute orders and pleadings filed in the state superior court actions, and therefore, present evidence extrinsic to the pleadings of this action. "A represented party who submits matters outside the pleadings to the judge and invites consideration of them has notice that the judge may use them to decide a motion originally noted as a motion to dismiss [as one] requiring its transformation to a motion for summary judgment." Grove v. Mead School Dist., 753 F.2d 1528, 1532-33 (9th Cir.), cert. denied, 474 U.S. 826 (1985); Garaux v. Pulley, 739 F.2d 437, 439-40 (9th Cir. 1984).

A Court need not make a formal order converting a 12(b)(6)

motion to one for summary judgment under Rule 56. The record need only show that the opposing party was "fairly apprised" that the Court would look beyond the pleadings. Grove, 753 F.2d at 1532; Garaux, 739 F.2d at 439-40. Plaintiffs neither objected nor disputed the attachment of exhibits to the motions to dismiss. Moreover, Defendants' motions and Plaintiffs, responses are dedicated to discussing the substance of !the attached exhibits. The Court finds that Plaintiffs were fairly apprised that the Court would consider the matters submitted outside of the pleadings. Each party has had a reasonable opportunity to present all the evidence pertinent to a motion for summary judgment. The motions will be addressed accordingly.

A court must grant summary judgment if the pleadings and supporting documents, viewed in the light most favorable to the nonmoving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) (1995); see also Celotex Corip. v. Catrett, 477 U.S. 317, 322-23 (1986); Jesinger

v. Nevada Federal Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994). Substantive law determines which facts are material. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986) ; see also Jesinger, 24 F.3d at 1130. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. 11 Anderson, 477 U.S. at 248. The dispute must also be genuine, that is, "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.; see also Jesinger, 24 F.3d at 12 1130. A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." Celotex, 477 U.S. at 323-24. Summary judgment is appropriate against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322; see also Citadel Holding Corp. v. Roven, 26 F.3d 960, 964 (9th Cir. 1994). The moving party need not disprove matters on which the opponent has the burden of proof at trial. Celotex, 477 U.S. at 317. The party opposing summary judgment "may not rest upon the

mere allegations or denials of [the party's] pleadings, but . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see also Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 585-88 (1986); Brinson v. Linda Rose Joint Venture, 53 F.3d 1044, 1049 (9th Cir. 1995)

II. BACKGROUND

On October 10, 1995, pursuant to the advice of Defendant John Moffitt ("Moffitt"), the City attorney, the City of Prescott embodied as the City Council members (Defendants Malcolm Barrett, Louis Franyi, Nancy Holaday, Philip King, Mary Ann Suttles, Karen Thompson - collectively "City Council"), and Mayor Daiton Rutkowski passed City Ordinance #3423. The ordinance provided for the sale of Hassayampa Lake, with the following provision:

> ". . . . the immediate operation of the provisions of this ordinance is necessary for the immediate preservation of the public peace, health or safety, and that an EMERGENCY is hereby declared to exist; and THIS ORDINANCE SHALL BE IN FULL FORCE AND EFFECT FROM AND AFTER ITS PASSAGE, ADOPTION AND APPROVAL BY MAYOR AND COUNCIL OF THE CITY OF PRESCOTT." Prescott Ordinance #3423 of 10/10/95 (Emphasis in original). B-6

Compl., at p. 3, 11. 6-10 (hereinafter "emergency clause"). No emergency in fact existed. Id. at 1. 11. The purpose and effect of the emergency clause was to bypass the referendum process and to ensure that the ordinance was placed into effect without voter approval. Id. at 11. 11-14.

On December 19, 1995, again with the advice of the City attorney, the City Council and the Mayor passed City Ordinance #3460 which authorized the acceptance of real property in the vicinity of Hassayampa Lake from individuals who may have had claim to the property, and authorized the Mayor and his staff to effectuate the conveyance. Ordinance #3460 also contained an .emergency clause. Again, no emergency existed, and the purpose and ef f ect of the emergency clause was to prevent the use of the referendum. id. at p. 4, 11. 1-14.

On January 4, 1996, advised by the City attorney, the City of Prescott Clerk refused to issue a referendum petition number to an individual by the name of Robert Hay, when he attempted to obtain one to refer Ordinance #3640 to the registered voters of Prescott, AZ. Upon the advice of the City attorney, the City of

Prescott, embodied as the current City Council and the Mayor, now routinely passes ordinances with an emergency clause when no emergency exists. The emergency clause is inserted deliberately to deprive the voters of the use of the referendum process. See id., at p. 5, 11. 1-9.

On January 31, 1997, the Yavapai County Superior Court granted a motion to dismiss an action to which all Plaintiffs, with the exception of Joseph Wenzel, were a party. See City of Prescott's Memorandum Supporting Motion to Dismiss Amended Complaint Pursuant to Rule 12(b), FRCP ("City's Mem.11), Exh. 1, Decision and Order, Gulstrom, et al. V. City of Prescott,' et al., Yavapai County Superior court Cause No. CV 95-0752 ("Gulstrom decision"). In the state court action, Plaintiffs alleged that the passage with an emergency clause of Ordinance #3423, the ordinance at issue in this action which provided for the sale of Hassayampa Lake by auction, violated Plaintiffs' Arizona constitutional right to a referendum, Article 4, Part 1, § 1. See City's Mem., Exh. 1, Complaint for Gulstrom, et al. v. City of Prescott, et al., Yavapai County Superior court Cause

No. CV 95-0752. (11 ulstrom Compl.11) Plaintiffs sought a preliminary injunction enjoining the sale of the land pursuant to the auction, and a permanent injunction prohibiting the use of the emergency clause in any ordinance authorizing the sale of the lake and surrounding property. See id.

November 2, 1995, the Yavapai County Superior Court ruled that the passage of Ordinance #3423 with an emergency clause was a valid, conclusive and non-reviewable exercise of legislative discretion notwithstanding the existence or nonexistence of an actual emergency. See Gulstrom decision, at p. 2. Accordingly, the court dismissed Plaintiffs' preliminary injunction complaint for failure to state a claim upon which relief could be granted. See id.

Plaintiffs filed a Petition for Special Action in both the Arizona Court of Appeals and the Arizona Supreme Court. The Court of Appeals declined to accept jurisdiction on November 28, 1995. See City's Mem., Exh. 2, Glustrom, et al. v. Superior Court of the State of Arizona, Arizona Court of Appeals No. 1 CA-SA 95-0296. Then, on February 21, 1996, the Arizona Sup*reme

Court also declined to accept jurisdiction over Plaintiffs, Petition for Special Action. See id. at Exh. 3, Arizona Supreme Court No. CV-95-0542-SA.

On January 4, 1996, Robert Hay filed a Petition for Special Action against the Prescott City Clerk and the City Attorney in the Yavapai County Superior Court in connection with the City Clerk's refusal to issue him a referendum petition number. See City's Mem., Exh. 4, Petition for Special Action in Hay v. Watson, Yavapai Superior Court Cause No. CV 96-0015. Hay alleged that the refusal to issue a referendum or initiative number was an abuse of discretion in violation of A.R.S. SS 19-141(a) and 19-111(B). Petitioner sought an order to the City Clerk to issue the referendum number.

Defendants filed a motion to dismiss, which was granted on February 13, 199G. The court found that (1) pursuant to a 1992 amendment to the statute, the provisions of A.R.S. § 19-111 are not mandatory, and (2) pursuant to the Constitution of the State of Arizona, Article IV, Part I, Section 1, Section 1(3), there is no Arizona constitutional right to referendum for an

ordinance passed with an emergency clause. Accordingly, the Court found that the Clerk did not abuse her discretion in refusing to issue a referendum number on Ordinance #3460.

Plaintiffs filed this action in federal district court on October 8, 1996, challenging the passage with emergency clauses of Ordinances #3423 and #3460 as violative of the Plaintiffs' federal voting rights in violation of 42 U.S.C. §§ 1983 and 1985. Plaintiffs allege that Defendants have at all relevant times, acted under the color of law to impair the voting rights of the registered voters of the City of Prescott in violation of 42 U.S.C. § 1983. In addition, the past and ongoing use of the emergency clause is a deliberate and continuing conspiratorial act done also in violation of 42 U.S.C. § 1985.

II. DISCUSSION

A. *Res judicata*

Defendants City of Prescott and Hassayampa Lake Holdings argue that because the identical issue of the City's adoption of the ordinances with the emergency clause was litigated previously in state court, Plaintiffs are barred from raising

the issue in this action under the doctrine of *res judicata*.

The doctrine of *res* judicata applies generally only where there is (1) a valid, final judgment (2) on the merits (3) and a subsequent action involving the same parties or those in privity (4) based on the same cause of action. Hooker v. Klein, 573 F.2d 1360, 1367 (9th Cir.), cert. denied, 439 U.S. 932 (1978) . Where *res judicata* applies, it bars relitigation of not only those issues litigated, but also those relevant issues that should have been raised but were not. Heiser v. Woodruff, 66 S.Ct. 853, 857 (1946). An exception to the general rules may exist, however, where a member of a class that is not a party to the suit is "adequately represented" by a party. See Hansberry v. Lee., 61 S.Ct. 115, 118-19 (1940).

The Court finds it unnecessary to determine in this action the first three factors of *res* judicata. Assuming arguendo each is met, including that the Plaintiffs in this action were in privity with or adequately represented by the plaintiffs in the prior state court actions, *res judicata* is nonetheless inapplicable to this action because the same causes of action

were not previously litigated in state court.

Plaintiffs challenge the City Councills prior and continuing use of an emergency clause attached to an ordinance, where no emergency in fact exists, as violative of the Due Process guarantees of the United States Constitution. The Complaint in Glustrom sought a preliminary injunction to enjoin the sale of Hassayampa Lake pursuant to the alleged unlawfully passed Ordinance #3423. The Complaint alleges that "[because of the imposition of the invalid emergency clause, [plaintiffs] may be precluded from the pursuing of a referendum vote regarding the sale of the Hassayampa Lake property." Further the complaint alleges that the failure to comply with the referendum process pursuant to A.R.S. § 9-403 "violates the letter and spirit of government stewardship over public, recreational land." The complaint, therefore, does not allege specifically what cause of action the complaint was brought pursuant thereto. The Glustrom decision, however, cited only', the Arizona Constitution and Arizona state law in deciding that Plaintiffs, complaint must be dismissed. There is no

indication that any federal issues were raised or considered.

Hay v. Watson, et al., Yavapai County Superior Court Cause No. Civ. 96-0015, was initiated by a Petition for Special Action seeking an order to the Prescott City Clerk to issue a Referendum Petition number for Ordinance #3460. The Petition alleged that the City Clerk's refusal to issue the Petition number violated Arizona state law, A.R.S. §§ 19-141 and 19-111. The Superior Court denied the Petition after scrutinizing the allegations under the relevant Arizona statutes, and the Arizona Constitution, Article IV, Part I, Section 1, Section 1 (3) Accordingly, like Glustrom, there is also no indication in the Hay state court action that any federal constitutional issues were litigated.

Because the federal constitutional issues raised in this action were not considered in the prior state court actions, the doctrine of *res judicat:a is* inapplicable. But see, Heiser v. Woodruff, 66 S.Ct. 853, 857 (1946) *(res* judicata applies not only to matters litigated and decided but also all relevant issues which could have been but were not raised.) Accordingly, this

Court has subject matter to determine the remaining issues of Defendants' motions to dismiss.

B. Failure to State a Claim under 42 U.S.C. 5 1983

In order to state a claim under § 1983, Plaintiffs must show: (1) the defendants acted under color of law; and (2) their conduct deprived them of a constitutional right. Hernandez v. Johnston, 833 F.2d 1316, 1318 (9th Cir. 1987), citing Haygood v. Younger, 769 F. 2d 1350, 1354 (9th Cir. 1985) (en banc) , cert. denied, U.S. _, 106 S.Ct. 3333 (1986). Moreover, due process claims under the Fourteenth Amendment are cognizable only if there is a recognizable liberty or property interest at stake. Coakley v. Murphy, 884 F.2d 1218, 1220 (9th Cir. 1989), citing Board of Regents v. Roth, 408 U.S. 564, 92 S.CTP 2701 (1972), Rizzo v. Dawson, 778 F.2d 527, 530 (9th Cir. 1985). Such an interest can arise either under the Constitution or the laws of the states. Hewitt v. Helms, 459 U.S. 460, 466 (1983)(citations omitted).

Plaintiffs argue that under Grant v. Meyer, 486 U.S. 414,

108 S.Ct. 1886 (1988), the Fourteenth Amendment extends federal constitutional rights to state enacted privileges of initiative and referendum. The Court is not persuaded by Plaintiffs' interpretation of the Supreme Court decision. Grant v. Meyer was a First Amendment challenge to a state statute criminalizing the payment to any person circulating an initiative petition. See id. at 1889, n. 1. After applying exacting scrutiny, the Court struck down the law as an impermissible burden on political expression in violation of the First and Fourteenth Amendment of the United States Constitution. Id. at 1895. The portion of the case Plaintiffs cite stands rather for the proposition that while a state may ban state-created rights, it may not do so in such a manner that abridges recognized federal liberties. See id, at 1893.(3) Grant v. Meyers does not elevate the state initiative or referendum process to the level of a federal constitutional right. The power of initiative and referendum is a state-created right only. See Meyer v. Grant, 108 S.Ct. 1886, 1893 (1988). All claims for relief asserted in Plaintiffs, complaint allege impairment of Plaintiffs, right to

vote on the referendum. Thus, Plaintiffs have alleged no federal constitutional interest at stake.

Moreover, Plaintiffs have failed to allege a state created right for which constitutional adherence is required for its application. A.R.S. § 19-142 provides that town ordinances passed as emergency measures necessary for the immediate preservation of the peace, health, or safety of the town may be effective immediately. .Accordingly, there is ro right to a referendum for a statute with an emergency clause. The City Council Is passage of an ordinance with an emergency clause, even where no emergency exists, violates no right(s) created by the State of Arizona. See City of Phoenix v. Landrum & Mills Realty 'Co., 71 Ariz. 382, 227 P. 2d 1011 (1951) (A determination by City Council that emergency exists is non-reviewable exercise of legislative discretion); Orme v. S it River Vallev Water Users' Assoc., 25 Ariz. 324, 217 P. 935 (1923) (Declaration that

emergency exists alone is sufficient to exempt ordinance from

Ft.3 For example, the City of Prescott, absent compelling state interests, would be prohibited from passing with an emergency clause, e.g., only ordinances affecting a protected class, an ordinance that prohibits the use of protected speech.

referendum under A.R.S. § 19-142(B)). Thus, to the extent Plaintiffs allege a federal constitutional deprivation based upon the laws of the state, Plaintiffs' complaint must be dismissed.

C. Failure to State a Claim under 42 U.S.C. 5 1985(3)

Plaintiff also seeks relief under 42 U.S.C. S **1985(3).** Although neither of Defendants' motions address Plaintiffs, § 1985 claim, they each seek dismissal of Plaintiffs, entire complaint. However, because Plaintiffs, complaint with respect to their § 1985 claims is patently deficient, the Court will address them in the interest of judicial economy.

Section 1985 authorizes causes of action for conspiracy to interfere with civil rights. Section 1985 was enacted by the Reconstruction Congress to protect individuals, primarily African Americans, from conspiracies to deprive them of their legally protected rights. Sever v. Alaska Pullo Corp., 978 F-2d 1529, 1536 (9th Cir. 1992). The Act is derived from the Thirteenth Amendment and covers deprivations of equal protection of the laws and privileges and immunities under the law,

regardless of its source. Gillesiole v. Civiletti, 629 F.2d 637, 641 (9th Cir. 1980). Thus, § 1985 is not to be construed as a general federal tort law, as it does not create any independent substantive rights, but rather serves as a purely remedial statute for deprivations of constitutional rights. Sever, 978 F.2d at 1536-37.

> To state a cause of action under section 1985(3), a complaint must allege (1) a conspiracy, (2) to deprive any person or class of persons the equal protection of the laws, or of equal privileges and immunities under the laws, (3) an act by one of the conspirators in furtherance of the conspiracy, and (4) a personal injury, property damage, or a deprivation of any right or privilege of a citizen of the United States.

Gillespie, 629 F.2d at 641 (citing Griffin v. Breckenridcre, 403 U.S. 88, 102-03 (1971)).

The mere alleging of the elements set forth in Gillesipie, however, does not satisfy the pleading requirement under § 1985. A valid § 1985 claim must allege that the second of the four elements, (i.e., the deprivation), was based upon or motivated by invidiously discriminatory racial or class-based animus. Breckenridcre, 403 U.S. at 102; Sever, 978 F.2d at 1536; see also

Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). Moreover, the allegation of conspiracy must be set with specific facts; "a ,general allegation of conspiracy without factual specificity is insufficient.,, Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 626 (9th Cir. 1988).

The Ninth Circuit specifically requires "either that the courts have designated the class in question a suspect or quasi27 suspect classification requiring more exacting scrutiny or that Congress has indicated through legislation that the class required special protection." Sever, 978 F.2d at 1536 (quoting DeSantis, 608 F. 2d at 333) Allegations of a class in this action include the voters or citizens of Prescott, neither of which is has been accorded these special protections. Accordingly, Plaintiffs are not a member of a protected class, and their § 1985(3) claims must be dismissed accordingly. Id.; see also United Brotherhood of Carpenters & Joiners of Am. v. Scott, 463 U.S. 825 (1983) (denying a class of non-union employees section 1985 protection for their alleged exercise of First Amendment rights, commenting that "it is a close question

whether section 1985(3) was intended to reach any class-based animus other than animus against negroes and those who championed their cause . . . . ").

IV. RULE 11 SANCTIONS

Both Defendants' motions seek attorneys' fees pursuant to Rule 11 of the Federal Rules of Civil Procedure. Defenjant Hassayampa Lake Holdings, Inc. argues that the absence of a federal constitutional right to referendum is so well grounded in law that a sanction should be imposed for filing a complaint not well grounded in fact or warranted by existing law. In their motion, however, Defendant Hassayampa Lake Holdings, Inc. failed to cite any controlling authority on the issue so well grounded in fact or warranted by existing law. Defendant City of Prescott supports its request on the basis that Plaintiffs filed previous state actions on the issue, and counsel made a public statement that while he thought the courts would be reluctant to get involved, he hoped to get the sale of the Hassayampa Lake stalled.

The Court finds that while Plaintiffs, complaint is not

warranted by existing law, the action is not entirely frivolous. Nor are there sufficient facts before the court to warrant a finding of improper purpose. See Townsend v. Holman Consultincr Corp., 929 F.2d 1358 (9th Cir. 1990). Defendants' motions for sanctions are denied.

V. CONCLUSION

The doctrine of *res* judicata does not apply in this action where no federal cause of action was adjudicated in the prior state court actions. However, Plaintiff fails to state a cognizable claim under 42 U.S.C. §§ 1983 or 1985(3). Further, as Plaintiffs' complaint fails to state a claim for relief, the issue of whether Plaintiffs' claims would have been barred for failure to file a claim with the City of Prescott pursuant to A.R.S. § 821.01 is moot, and therefore may not properly, be decided by the Court at this time. Finally, the Court notes that on June 9, 1997, the United States Supreme Court granted certiori on the issue of whether individual members of a local legislative body are entitled to absolute immunity from liability under 42 U.S.C. 1983 for actions taken in a

legislative capacity. See Bogan v. Scott-Harris 1997 WL 181002

(June 9, 1997). Consistent with the foregoing opinion,

IT IS THEREFORE ORDERED Defendant City of Prescott's Motion to Dismiss Amended Complaint Pursuant to Rule 12(b), FRCP filed on December 19, 1996 is **GRANTED.** [doc. #7-11

IT IS FURTHER ORDERED Defendant City of Prescott's Motion for Rule 11 Sanctions filed on December 19, 1996 is **DENIED.** [doc. #7-21

IT IS FURTHER ORDERED Motion of Defendant Hassayampa Lake Holdings to Dismiss Amended Complaint Pursuant to Rule 12 (b) FRCP filed on January 31, 1997 is **GRANTED.** [doc. #13-1]

IT IS FURTHER ORDERED Motion of Defendant Hassayampa Lake Holdings for Rule 11 Sanctions filed on January 31, 1997 is **DENIED.** [doc. #13-2]

IT IS FURTHER ORDERED all other motions pending in this action are **DENIED** as moot.

IT IS FURTHER ORDERED the Clerk of the Court shall **DISMISS** this action with prejudice.

DATED this 28 day of July, 1997.

Signature of Honorable Stephen M. McNamee
Stephen M. McNamee
United States District Judge

Copies to all counsel of record.

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APPENDIX C-9 PAGES

AUG 12 1997(stamp of)
CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

JOANNE STONE, CHARLENE CRAIG, JAMES CRAIG, JOVITA FINE, and JOSEPH WENZEL, Plaintiffs v. CITY OF PRESCOTT, a municipal entity; MALCOLM BARRETT; LINSAY BELL; PAUL DALY; LOUIS FRANYI; NANCY HOLADAY; PHILIP KING; MARY ANN SUTTLES; KAREN THOMPSON; DAITON RUTKOWSKI; HAROLD WISE; JOHN MOFFITT; HASSAYAMPA LAKE HOLDINGS, L.L.C., Defendents	] CIV 96-2305-PCT-SMM] PLAINTIFFS MOTION TO ALTER OR AMEND A JUDGMENT PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 59(a) and 59(e)

Plaintiffs petition this Court, according to Federal Rules of Civil Procedure, Rule S9(a) and S9(e), submitted timely in accord with FRCP Rule 6(a). Plaintiffs view the judgement of July 30, 1997 rendered in the foregoing matter as including error and fundamental error for the following reasons:

1. Plaintiffs remind this Court that in their Reply to Hassayampa Lake Holdings, L.L.C. Motion to Dismiss of February 13, 1997, Plaintiffs cited in the associated Memorandum, three fundamental rights associated with b oth the Initiative and Referendum :

> From Federal case law, Plaintiffs may identify at least' three Federal Constitutional rights associated with the initiative and the referendum; 1) the First Amendment right of political speech; and 2) the citizens' right to petition the government; and 3) the citizen voting rights when the petition is placed upon the ballot. The similarity in the referendum and initiative procedure, with the first referring enacted legislation, the second proposing new legislation precludes arguments that the Federal Constitutional rights involved are somehow different. Memorandum, pg.A. lines 9-18.

Those rights and the use a non-factual declaration of "emergency" to absolutely abridge those cited fundamental Constitutional rights is within the scope of "judicial notice".

In Grant v. Meyer, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed. 2d 425 (1988), the United States Supreme Court stated:

> Held: The statutory prohibition against the use of paid circulators abridges appellees' right to engage in political speech in violation of the First and Fourteenth Amendments.

The matter before this Court involves an absolute and

unjustified abridgement of Plaintiffs rights to engage in First and Fourteenth Amendment protected political speech and not a mere restriction as in Grant v. Meyer, supra.

Plaintiffs assert that the failure of this court in its judgement to recognize those three fundamental rights as absolutely abridged by the actions of the City of Prescott as embodied by the Mayor, City Council, and advised by the City Attorney, constitutes fundamental error on the part of this Court.

2. Plaintiffs have repeatedly cited the abridgement of their Constitutional rights in their Amended Complaint and various replies. This Court has provided no United States Supreme Court decision which modifies or overturns the decision in Chastleton Corporation v. Sinclair, 264 U.S. S43, 44 S.Ct; 40S, 68 L.Ed. 841 (1924), with regard to there being a factual basis for legislative action involving emergency declarations. Chastleton Corporation, supra, explicitly requires a factual basis for legislation involving emergencies, and states:

[2,3] We repeat what was stated in Block v Hirsh, 2SS U.S. 139, 41 Sup.Ct. 458, 65 L.Ed. 86S, 16 A.L.R. 165, as to the respect due to a declaration of this kind by the Legislature so far as it relates to present facts. But even as to them a Court is not a liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth 13 of what is declared. 256 U.S. 154; 41 S.Ct. 458, 6S L.Ed. 865, 16 A.L.R. 16S. Chas.Wolf Packing Co. v. Court of Industrial Relations, 262 U.S. 522, 536, 43 Sup.Ct. 630, 67 L.Ed. 1103, 27 A.L.R. 1280. And still more obviously so far is as this declaration looks to the future it can be no more than prophecy and is liable to be controlled by events. A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed. 264 U.S. 543, 547-48, 44 S.Ct. 405, 406. See also Memorandum-Amended Complaint, page 4, lines 1-6.

This Court elects to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth and cites City of Phoenix v. Landrum Mills Realty Co., 71 Ariz. 382, 227 P.2d 1011 (19SI), and "legislative discretion" as the governing authority in the United States for permitting the declaration of a non-factual emergency which would abridge the previously cited Constitutional rights associated with the referendum. This Court also chooses not to provide the necessary case law which would override this governing United States Supreme Court decision. Plaintiffs view the failure of

this Court to recognize Chastleton Corporation, supra, as the governing authority with regard to "legislative discretion" and the declaration of emergencies affecting Constitutional rights as fundamental error.

3. The failure of this Court, to recognize as valid the first two points given, also led this Court to rule that Plaintiffs had "failed to state a claim upon which relief may be granted." Because of the first two points given, Plaintiffs assert that such a judgment is fundamental error.

4.. The failure of this Court to recognize as valid, the first two points given, also led this Court to rule that no identifiable class of persons were injured or existed. The class of persons injured would consist of all eligible voters in the City of Prescott who would engage in at least the three previously mentioned Constitutional rights in the process of soliciting voters signatures for the referendum, publicizing and discussing the issues both during the petition drive and prior to the election and finally voting on the referendum in an act which also represents "petitioning the

government." Plaintiffs assert that the failure of this Court to recognize the extent of injury to the eligible voters of the City of Prescott as a class constitutes fundamental error.

5. Plaintiffs have made no claim in the causes for action that Defendant, Hassayampa Lake Holdings, L.L.C., engaged in a conspiracy to deny fundamental Constitutional rights. Defendant, Hassayampa Lake Holdings, L.L.C. was included as the joinder of an essential party since the relief sought included the rescinding of the sale of the purchased properties known as Hassayampa Lake. This explanation was provided. Any other interpretation is construction of the wording of the complaint. Plaintiffs believe that the failure to recognize this explanation in the judgement constitutes error by this Court.

6. No mention is made in this judgement of the prior successful referendum of September 27, 199S, which terminated the proposed sale by the City, of the Acker bequest properties of seventy-three acres which lie within the City of Prescott on South Virginia Street. On September 27, 1995, 7906 citizens of Prescott voted upon Question 2 of the referendum issues, and

5339 or 68.4 percent voted to keep the Acker lands intact and undeveloped. On October 10, 199S the then Mayor and City Council of Prescott passed Ordinance #3423, with the non-factual emergency clause, to enable the sale of the Hassayampa Lake properties. This successful referendum is the logical and factual trigger to the action of the City of Prescott, embodied in the Mayor and City Council to engage in non-factual declaration of emergencies so as to prevent similar citizen referendum petitions regarding City of Prescott ordinances. Plaintiffs believe that the failure of this Court to cite this as part of the factual history of the case constitutes error.

7. Defendants have failed to provide the compelling reason for the use of a non-factual emergency, and this Court has also failed to note that lack of disclosure in this judgement. There is no burden of proof upon Plaintiffs to provide that a compelling reason, though the successful referendum cited above on the Acker bequest properties is a reasonable circumstantial inference. Plaintiffs assert that the failure of this Court to request the compelling reason for the use of a

non-factual emergency in a case involving the abridgement of Constitutional rights represents fundamental error.

8. The issue of fact for a trial is whether for each and every use of the emergency clause attached to a City of Prescott ordinance, as in Exhibit B of the Amended Complaint, a factual emergency existed, and if not for what purpose did the Mayor and City Council of Prescott engage in such an evasion. This issue of fact is unresolved by summary judgment and Defendant, City of Prescott has provided no answer to this policy. Plaintiffs view the failure of this Court to resolve such an issue of fact as fundamental error.

9. Plaintiffs are aware that the Mayor, City Council and City Attorney have various forms of immunity related to legislative acts. That immunity precludes liability judgement and nothing more. Since their acts together represented an attempt to deprive the civil rights of eligible citizens of the City of Prescott, that immunity does not preclude their being held accountable for their acts. While 42 U.S.C. & 198S may have been enacted to protect those newly liberated African-

American citizens, the Fourteenth Amendment precludes any restrictive purpose to that end and such an interpretation of 42 U.S.C. & 198S into present time is viewed by Plaintiffs as fundamental error by this Court. Further, based upon all of the material presented and the failure of the City of Prescott to present the compelling reason for declaring a non-factual emergency and thereby inhibiting the referendum, "the act speaks for itself" and warrants political speech.

For the foregoing reasons, Plaintiffs request this Court to reconsider the judgement given in this matter, and to rule favorably for Plaintiffs so as to protect the Constitutional rights cited of Plaintiffs and the affected class.

Dated August.11 1997 By *signature of William B. Fortner*

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Copy of the foregoing mailed this 12.. day of August, 1997 to:

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APPENDIX D-4 PAGES

SEP 19 1997(stamp of)
CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

JOANNE STONE, CHARLENE CRAIG, JAMES CRAIG, JOVITA FINE, and JOSEPH WENZEL, Plaintiffs v. CITY OF PRESCOTT, a municipal entity; MALCOLM BARRETT; LINSAY BELL; PAUL DALY; LOUIS FRANYI; NANCY HOLADAY; PHILIP KING; MARY ANN SUTTLES; KAREN THOMPSON; DAITON RUTKOWSKI; HAROLD WISE; JOHN MOFFITT; HASSAYAMPA LAKE HOLDINGS, L.L.C., Defendents	CIV 96-2305-PCT-SMM **ORDER**

Plaintiff filed a timely motion for reconsideration of this Court's Order of July 30, 1997. Pursuant to Rule 1.10(p) of the Rules of Practice of the United States District Court, the Court ordered a response from Defendants. Defendants City of Prescott and Hassayampa Lake Holdings, LLC, both filed responses on August 29, 1997. Having reviewed each of the pleadings, the Court denies Plaintiff's motion for reconsideration.

A district court may grant a motion to reconsider only in "highly unusual circumstances. See School Dist. No. *1J.* Multnomah County v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993). "Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." Id. A motion for reconsideration should not be used to ask the court "to rethink what the court had already thought through-- rightly or wrongly". Above the Belt, Inc. v. Mel Bohannan RoofincT, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983). Arguments that the court was in error on the issues it considered should be directed to the court of appeals. See Sullivan v. Faras-RLS Groulp, Ltd., 795 F. Supp. 305, 308 (D. Ariz. 1992). Procedurally, motions to reconsider are generally treated as motions to alter or amend the judgment or a motion for relief from a judgment or order. See Fed. R. Civ. P. 59 (e), 60 (1995). Thus, a court may grant a motion for reconsideration for the following reasons: (1) mistake, inadvertence, surprise, or

excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b) ; (3) fraud; (4) the judgment is void; (5) the judgment has been satisfied; and (6) any other reason justifying relief from the operation of the judgment. id. 60(b). Under the Local Rule, the Court may deny a motion for reconsideration without allowing the opposing party to respond. See Rules of Practice for the United States District Court, District of Arizona, 1.10(p) (1994). However, the Court must allow the opponent to respond before granting the motion. See id.

Each argument raised in Plainti-ff's motion for reconsideration was raised in Plaintiff's prior pleadings, and addressed by the Court in its Memorandum of Decision and Order of which Plaintiff seeks reconsideration. Plaintiff has raised no new grounds which justify reconsideration of the Court's initial decision. As such, Plaintiff fails to present a highly unusual circumstance, but instead, merely asks the Court to rethink what it has already thought. This form of review is

more appropriate for the appellate courts.

IT IS THEREFORE ORDERED Plaintiff's Motion to Alter or Amend A Judgment, Pursuant to Federal Rules of Civil Procedure 59(a) and 59(3) filed on August 12, 1997 **[doc. #75] is DENIED.**

DATED this 18 day of September, 1997.

Signature of Honorable Stephen M. McNamee
Stephen M. McNamee
United States District Judge

Copies to all counsel of record.